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THE UNWRITTEN LAW—A WITCHCRAFT HERESY OF THE NINETEENTH CENTURY.

The unwritten law is as great a fallacy, to our mind as was the witchcraft heresy in the seventeenth century. Surely, subsequent centuries, as they look back upon us, will be inclined to tap their heads and deplore the practical ignorance of a people who encourage a man to kill his fellow man over a woman's faithlessness, and let the woman go forth from court with a feeling of contempt for the law?

It is the purpose of the Central Law Journal to combat this heresy and offer from time to time practical objection to its effectiveness as an argument—objections that will appeal, of course, to a jury, rather than to a court. For, assuredly, any court or judge thereof, who would give this pernicious and lawless doctrine even the faintest recognition is false to his oath of office which compels him to enforce the law and to set his face like a flint against any principle which encourages lawlessness.

We will, in the beginning, except from our attack those instances where a man kills another man in protecting the virtue and innocence of a woman, especially of any female member of his family from attempted insult or assault. This is not the unwritten law, it is law sanctioned by every consideration of public policy and private right. Possibly, also, where the despoiler has already robbed a woman of her virtue and where immediate pursuit is begun and the despoiler killed in the heat of passion, by the man to whom she stood related by any of the sacred social ties of this life, the law should reduce this crime to a low degree of manslaughter or the jury be willing to stretch their consciences by showing extreme leniency in dealing with the offender. But, outside of these exceptions, which really are not exceptions at all, there is no place for the unwritten law.

Chivalry and gallantry are usually given as the high ground upon which this rule rests. Absolutely impossible! No man, really brave or chivalrous, who had killed a man to avenge a girl's honor, would, if he ever loved that girl for whom he thus endangered his life, call upon her to lay bare to the gaze of a scornful public the secret sins in her life and to offer on the altar of her devotion for him, that which is dearer to her than her life, in order to save his miserable head. Rather would he desire her mistakes to remain covered and to go to his doom conscious of the sacrifice which he has made for her.

Nor do the women whose "honor" is thus thought to be so chivalrously protected always relish a sort of gallantry which so cowardly shows the white feather when it appears in a court of justice. Not long ago a man killed a man somewhere on the north Pacific coast and escaped the gallows by saying he did it to protect the honor of his daughter. Not long afterward that daughter killed her father, saying that her honor was safe in her own keeping until he chose to besmirch it with unfounded calumny. "Some of the men," says the Knoxville (Tenn.) Sentinel, "who murder for chivalrous reasons are as brave as the average but few or none of them are brave enough to carry their chivalry into the court room by sealing their lips. Some of them act deliberately and not in passion. It is strange that these do not reflect that love of one's own life is an even stronger motive than honor and do not search for other ways of protecting the fair name of their friend."

Another strong argument that should appeal to a jury of laymen is the fact that in a great many of the cases where the unwritten law is pleaded, the "woman in the case," whose honor is sought to be protected, often deserves a worse fate than the companion of her laisons. When a man's

wife goes wrong it is not usually the despoiler of her virtue that is responsible. Most often is it the case, that the woman, weary of her husband's attentions, seeks and encourages the caresses of strange men who cannot always be too severely blamed for yielding where there not only is not only no opposition but where there is often the most tempting encouragement.

A woman correspondent in the New York American, of April 11th, 1909, presents some unusual views from the standpoint of her knowledge of the weaknesses of her own sex, that should be widely circulated. "It is the custom," says the writer, "to assume that the woman is innocent and unsophisticated as Eve before the fall, and that when the serpent enters into the domestic Eden he wriggles in uninvited by her, and proceeds to use all the arts and blandishments of the worldling to tempt her into straying down the primrose path with him. It is always Marguerite and Faust, as the story is told on the witness stand in the murder case. If this were true, indeed might the unwritten law become the written law, and the blood of the home wrecker be upon his own head. But the name of the married woman who goes wrong is not Marguerite. It is Sappho. It is Faustine, it is Lais, it is Magdalen. It is absurd, on the very face of it, to claim that a woman like Claudia Hains, for instance—and she is just a type of the kind of women men kill for—was enticed by Annis into being false to her husband, and that he was responsible wholly for the breaking up of Captain Hains's home. She was a married woman with three children. She lived in the midst of a gay and sophisticated society, and she was perfectly aware of the significance of everything that she did. As a matter of cold, hard fact, in ninety-nine cases out of a hundred, when an outraged husband cries out that some villain has robbed him of his wife she hasn't been stolen at all. She has given herself away and if the husband is determined to kill the real offender against his honor and his home he must slay the woman. It may be taken as an axiom that the only wives who are ever led astray are those who are perpetually on the lookout for a tempter. Only those married ladies are made love to who give men a tip that they are not averse to listening, and only those are involved in dubious situations who sidestep from the straight and narrow path. Married women are perfectly aware of the danger of playing with fire, and if they start the conflagration that burns up their honor and good repute no one can excuse them by saying that they did not know what they were about. In this country, at least, every honest wife is safe and every faithless wife meets her lover half way. Hence, the absurdity of a custom that takes the man's life and lets his aider and abettor go free."

NOTES OF IMPORTANT DECISIONS.

NEGLIGENCE—OBSTRUCTION OF FIRE ENGINE AS PROXIMATE CAUSE OF INJURY.—It is frequently difficult to determine whether the violation of a statutory regulation is the proximate cause of the injury but the apparent tendency of recent decisions is to resolve all doubts on such questions against the one who has violated such regulations. His adoption of such a rule serves to more effectually enforce the provisions of such statutory provisions.

The recent case of Houren v. Railway Co., 86 N. E. 611, is an illustration of this rule. In this case the fire department, while on the way to put out the fire in plaintiff's house, was interrupted by a blockade of street cars and delayed ten minutes in reaching the scene of the fire, whereby plaintiff's house was destroyed. The ordinances prohibited such blockades and for that reason it was alleged that their violation was negligence as a matter of law and the proximate cause of the injury and one which the defendant should have reasonably anticipated.

On this latter point the court said: "If a prudent man of experience had reflected upon the probable consequences of entirely closing up this street in a great city he would have foreseen, first, that to so close the street would obstruct and delay public travel thereon; second, that among the travel liable to be so obstructed and delayed would be the passage of

teams, engines and other appliances of the fire department; third, that if the travel of the fire department was so obstructed and delayed any fire which the men of that department were seeking to reach would be more extensive and do greater damage than if the obstruction and delay had not taken place."

It is no defense to such actions for the defendant to argue that it is not alleged or proven that the damage would have been prevented if there had been no violation of the statutory regulation. This is specifically held in the principal case which cited also the case of Kiernan v. M. C. Co., 170 Mass. 378, where, as in the principal case, says the court, "it could not be said with absolute certainty that they would have been able to prevent the destruction of the plaintiff's property had no interference occurred."

The doctrine in the case of interference with the fire department is being carried to its utmost limits and the rule has been applied to a case where a street railway company negligently injures one of three hoses playing upon a burning building. Little Rock Traction & Electric Co. v. McCaskill, 86 S. W. 997.

THE LIABILITY OF A COMMON CARRIER OF PASSENGERS FOR THE WRONGFUL ACTS OF A FELLOW PASSENGER.

Common carriers of passengers are defined to be "such as undertake to carry all persons indifferently who may apply for passage so long as there is room, and no legal excuse for refusing."[1] Railway companies, steamship companies, street car companies, and the owners of ferries, omnibusses and stage coaches are the ones usually included in this definition. Like common carriers of goods, common carriers of passengers are engaged in a public calling, and are regarded as undertaking a public duty. The public character of their business imposes upon them the duty of serving all without discrimination; and while they are not responsible, as insurers, for the safety of their passengers, yet they owe to them a degree of care and protection different from that which may be exacted of persons or corporations not charged with a public duty.

(1) Bouvier's Law Dictionary.

The General Rule.—Although it is a well established doctrine that a passenger is entitled to protection from any injury occasioned by a fellow passenger, the difficulty lies in determining when a carrier has been guilty of such a failure to perform its duty as will entitle the passenger to recover for said injury. Negligence being the gist of the action, the liability or non-liability depends upon a careful examination of the facts and circumstances of each case. For this reason it is extremely hard to state a rule which will cover every case. The general rule which seems to be the settled doctrine is well and succinctly stated in the American and English Encyclopaedia of Law to be, "Whenever a carrier, through its agents or servants, knows or has opportunity to know, of a threatened injury, or might have reasonably anticipated the happening of an injury, and fails or neglects to take the proper percautions, or to use proper means to prevent or mitigate such injury, the carrier is liable."[2] The duty of the carrier therefore is not absolute, but contingent, and arises from a condition, not of the carrier's, but of a third party's creation, coupled with a knowledge by the carrier's servants that the condition exists, and with time enough intervening between the acquisition of the knowledge and the infliction of the injury, to enable the servants of the carrier to protect the passenger from the actions of the fellow passenger. The carrier in such instances is not liable for the tort of the fellow passenger, but it is the negligence of the carrier in failing, after having knowledge, to prevent the injury to the passenger.[3]

The Early Cases.—In the early cases in which mention is made of this doctrine the

(2) American and English Encyclopedia of Law, Volume 5, Page 553; Fetter's Carriers of Passengers, Volume 1, Section 96; Pittsburg & Fort Wayne, etc., Co. v. Hinds, 91 Am. Dec. 224 (Pa.); New Orleans, etc., Co. v. Burke, 24 Am. Rep. 689 (Miss.); Putnam v. Broadway & Seventh Co., 55 N. Y. 108; Brown v. Chicago, Rock Island & Pac. Co., 139 Fed. 972; Spangler v. St. Joseph & Grand Island Co., 63 L. R. A. 634 (Kan.)

(3) Tall v. Baltimore Steam Packet Co., 47

courts did not promulgate it concisely, but contented themselves with cursory statements of the principles in the cases then at bar. In the case of Vinton v. The Middlesex Railroad Company,[4] there is a dictum to the effect that as incident to the business in which the carrier is engaged, it has not only the power, but is bound to take all reasonable care and proper means to insure the safety and provide for the comfort and convenience of the passengers. In the case of the Commonwealth v. Powers,[5] decided in 1844, the following language is to be found: "An owner of a steamboat or railroad is in somewhat a similar position to that of an inn keeper, whose premises are open to all guests, and whose duty it is to prohibit all disorderly conduct therein, excluding such persons as may be necessary to secure such quiet and good order." In the case of New Jersey Railroad Company v. Kennard,[6] this dictum is to be found in the opinion of the court: "A carrier is bound to guard the passenger from every danger that extreme vigilance can prevent. The passenger has put his life into their hands, and the carrier is liable to defend it as his own." In all of these early cases the facts were such as not to call upon the court to pass on the nature and extent of the carrier's liability, for the questions, there presented had to do chiefly with the power of the carrier to remove objectionable and dangerous persons from their cars. But the language used by the judges indicated what the courts would have held had the nature and extent of the liability been squarely before the tribunals. While these early cases stated, in a general way, some of the rules which govern the general liability of a common carrier of passengers for the wrongful acts of fellow passengers, it was not until the rendition of the decission, by the Supreme Court of Pennsylvania, in the case of Pittsburg, Fort Wayne, etc., Railway Company v. Hinds that the doctrine was concisely and definitely enunciated.[7]

Negligence the Gist of the Action.—As stated supra, the entire liability of the carrier is grounded on negligence, the action being one arising against the carrier for its failure to carry safely and protect the person of the passenger. To protect the passenger from injury is the general duty which the law imposes on the carrier, and which it impliedly assumes in its contract to carry, and if the carrier be negligent in performing this duty properly, the company cannot escape liability if the passenger is injured as a result of such negligence. In the leading case of Pittsburg, etc., Railway Company v. Hinds,[8] the court said: "The only ground upon which the plaintiff can recover is for violation of the contract made with the carrier. The carrier undertook to carry the plaintiff safely, and so negligently performed this contract that the plaintiff was injured. The negligence of the company, or their officers in charge, is the gist of the action."[9]

The Degree of Care.—The carrier's liability being founded on negligence the courts have used a variety of forms of expression, not altogether harmonious, in attempting to define what constitutes negligence, that is, in stating the degree of care exacted, and in stating what will amount to sufficient care, on the part of the carrier to relieve it from liability for the wrongful acts of the fellow passengers. The rule which seems to be recognized by the weight of authority is that a carrier is required to exercise the highest degree of care and foresight consistent with the ordinary conduct of the business. One court in passing on the degree of care required, sums up the law in these words: "It is

(4) 11 Allen, 304.

(5) 7 Metc. 596.

(6) 9 Harris, 203.

L. R. A. 120 (Md.); Pittsburg, etc., Co. v. Hinds, 91 Am. Dec. 224 (Pa.)

(7) Pittsburg, etc., Co. v. Hinds, 91 Am. Dec. 224 (Pa.)

(8) 53 Pa. St. 512, 91 Am. Dec. 224.

(9) Pittsburg, etc., Co. v. Hinds, 91 Am. Dec. 224 (Pa.); Flint v. Norwich & New York Co., 34 Conn. 554; New Orleans, St. Louis, etc., Co. v. Burke, 24 Am. Rep. 689 (Miss.); Louisville & Nashville Ry Co. v. McEwan, 31 S. W. Rep. 465; Texas & Pacific Ry. Co., 83 S. W. Rep. 852.

well settled that a carrier of passengers is bound to exercise the uttermost care to maintain order and guard and protect passengers from violence and insult at the hands of fellow passengers, from such injury and insult as might reasonably have been anticipated or naturally expected to occur, in view of all the circumstances and the number and character of the passengers on board. The rule is founded on the fact that the company has control of its cars and premises, a police supervision to prevent violations of the law, and may lawfully eject and remove disorderly persons therefrom, or arrest or otherwise suppress and control them."[10] Mr. Fetter in his work, "Carriers of Passengers," sums up the degree of care required in these words: "It is now firmly established that a carrier of passengers must exercise the same high degree of care to protect passengers from the wrongful acts of their fellow passengers, or of strangers, that is required for the prevention of casualties in the management and operation of its trains, namely, the uttermost care, vigilance and precaution consistent with the mode of conveyance, and its practical operation."[11] While the various forms of expression used are not apparently harmonious, yet on careful examination it is evident that the apparent conflict in the cases is one of phraseology rather than any difference in the degree of care exacted.[12]

Knowledge Essential.—The liability or non-liability of a carrier of passengers for the wrongful acts of fellow passengers must be held to depend on the presence or absence of knowledge on the part of the carrier or its servants in charge. It is not absolutely necessary that the carrier, or the carrier's servants have actual knowledge that an injury is to happen. Knowledge of the existence of the danger, or of facts and circumstances from which the danger may reasonably be inferred or expected is all that is necessary to fix the liability. There must however be something to warn any reasonable, prudent and cautious man that an injury to the passengers is anticipated.[13] When the carrier has no knowledge of the threatened injury, and could not by proper diligence have anticipated the injury the carrier cannot be held liable.[14] Mr. Fetter in his work, "Carrier of Passengers," says: "Knowledge of the existence of the danger, or of facts and circumstances from which the danger may reasonably be anticipated, is necessary to fix a liability upon the carrier for damages sustained in consequence of failure to guard against it."[15] In New Orleans, St. Louis & C. R. Company v. Burke, Judge Chambers said in part: "It is first to be observed that the liability of a carrier arises not from the fact that the passenger has been injured, but from the failure of the officials to afford protection. It will be necessary, therefore, in each case to bring home to the conductor knowledge, or opportunity to know that the injury was threatened, and to show that by his prompt intervention he could have prevented or mitigated it."[16] The carrier will be held to have knowledge of what they should have known in the exercise of the high degree of care required of them. The vigilance exacted by the law requires the carrier's servants to keep their eyes and ears open and to be alert and watchful at all times.[17] Whether they hear or see the disturbance at the time of the injury or not, if it was loud enough for them to have

(10) Flint v. Norwich & New York Co., 34 Conn. 554; Putnam v. Broadway & Seventh Co., 55 N. Y. 108; Mullan v. Wis. Central Co., 46 Minn. 474; Wright v. Chicago, etc., Co. (Colo.), 35 Pac. 196; Spangler v. St. Joseph, etc., Co. (Kan.), 63 L. R. A. 634; Fetter Carriers of Passengers, Vol. 1, Section 96.

(11) Fetter Carriers of Passengers, Vol. 1, Section 96.

(12) Fetter Carriers of Passengers, Vol. 1, Section 96.

(13) Brown v. Chicago, Rock Island & Pac., 139 Fed. 972; 5 Am. & Eng. Ency. of Law, 553; Spangler v. St. Joseph, etc., Co., 63 L. R. A. 634; Britton v. Atlantic, etc., Co., 43 Am. Rep. 749 (N. C.); Wright v. Chicago, etc., Co., 35 Pac. 196 (Colo.)

(14) Putnam v. Broadway, etc., Co., 55 N. Y. 108.

(15) Fetter, Vol. 1, Section 96.

(16) New Orleans, St. Louis, etc., Co. v. Burke, 24 Am. Rep. 689.

(17) Wright v. Chicago, etc., Co., 35 Pac. 196 (Colo.)

heard, or at a place where they could have seen had they been in their proper places, the carrier is liable.[18] So held in a case where the evidence disclosed that the brakeman and conductor on a railroad train were out of their proper positions when the injury occurred, and had no knowledge of it in time to have prevented or mitigated the injury.[19] In the case of Spangler v. St. Joseph & Grand Island Railway Company,[20] the court held that it is the duty of a railway company to exercise the strictest diligence to protect passengers on its trains from the assaults of fellow passengers, not only while such fellow passengers remain on board the train, but also after they have alighted therefrom at the station of their destination whenever the company knows of the threatened injury or might reasonably have anticipated under all the circumstances that an injury would occur.[21] Following the general rule stated supra the courts have held that when train crews are changed at the end of a division the knowledge of the first crew is conclusively presumed to be communicated to the second crew, and whether the knowledge is communicated or not, and an injury results because of the failure to communicate, the carrier will be held liable for all injuries that occur.[22]

In states where the statutes require the carrier to provide separate coaches for the use of white and colored passengers the rule stated by the courts is that the carrier must guard against the invasion of one class into the apartments of the other. If the servants of the carrier allow white passengers to enter the coaches set apart for the use of colored passengers, and allow them to remain therein after their presence is discovered, the carrier will be liable for all wrongful acts of the white passengers without regard to whether the servants do, or do not have knowledge of the injury at the time that it is inflicted.[23] In a recent case the court said that, although the conductor may be ignorant of what is transpiring in the coach, yet if he has knowledge that the white passengers are in the coach set apart for colored passengers, the carrier is liable for all injuries inflicted by the intruding passengers.[24] If however, the intruder was in the car without the knowledge of the carrier's servants, then and in that event, the carrier is not liable for any injury that may happen.[25]

Duties of the Carrier's Servants.—The conductor in charge of the carriage has power and control over the train, and all persons upon it, with authority to compel observance of the regulations of the company, to preserve order, and to employ the whole force of servants, and of willing passengers, to assist, in maintaining order and protecting the passengers. These extensive powers involve the correlative duty to protect passengers, from violence and annoyance or interference by other parties.[26] The servants are the police officers of their carriage.[27] When the servants discover a threatened injury it is their duty to carefully protect the passengers in every reasonable way, and if an assault is being committed they must do their best to prevent its continuance. If there are passengers in the cars or vehicle who are drunk, riotous, dangerous, or who demean themselves so as to endanger the safety or interfere with reasonable comfort of the passengers, it is the duty of the carrier's servants to eject such person or persons.[28]

(18) Wright v. Chicago, etc., Co., 35 Pac. 196 (Colo.)

(19) Wright v. Chicago, etc., Co., 35 Pac. 196 (Colo.)

(20) 68 Kan. 47, 63 L. R. A. 634.

(21) Spangler v. St. Joseph, etc., Co., 63 L. R. A. 634.

(22) King v. Ohio & M. Ry. Co., 22 Fed. 413.

(23) Quinn v. Louisville, etc., Co., 32 S. W. Rep. 742; Wood v. Louisville Ry. Co., 42 S. W. 349; Britton v. Railway Co., 88 N. C. 536; Louisville, etc., Ry. Co. v. McEwen, 51 S. W. 619.

(24) See citation at (23).

(25) See citation at (23).

(26) New Orleans, St. Louis & Chicago Ry. Co. v. Burke, 24 Am. Rep. 689; Pittsburg, Fort Wayne, etc., Co. v. Hinds, 91 Am. Dec. 224 (Pa.); Duggan v. Baltimore & Ohio Ry. Co., 159 Pa. St. 248; Thompson "Negligence," Section 3089; Wright v. Chicago, B. & Q. Ry. Co., 35 Pac. 196; Putnam v. Broadway, etc., Co., 55 N. Y. 108; Chicago & Alton R. R. Co., 123 Ill. 9; Spohn v. Missouri & Pac., 87 Mo. 74.

(27) See citations at (26); Pittsburg, Fort Wayne, etc., Co. v. Hinds, 91 Am. Dec. 224.

(28) See citations at (26).

If the servants do not eject them they must so place them that they will not injure the passengers.[29] In the case of Putnam v. Broadway & Seventh Railway Company,[30] the court says: "A railroad company has the power of refusing to receive a passenger, or to expel one who is drunk, disorderly, or riotous, and this police power, the conductor, or other servant of the company, in charge, is bound to exercise with all the means he can command whenever the occasion requires."[31] If this duty is neglected without good cause and a passenger receives injury, which might have been reasonably anticipated, or naturally expected, from one who is improperly received or permitted to continue as a passenger, the carrier is responsponsible.[32] In the case of Pittsburg, Fort Wayne, etc., Railway Company v. Hinds, the court stated that in the event of disturbance on the train which he could not control that it was the duty of the conductor to stop the train, call together all the train hands, and those passengers who are willing to assist, and with this force quell the disturbance.[33] For failure to perform these duties the carrier must be held liable for any injury inflicted.[34] It must be remembered, however, that the conductor can never be expected to accomplish anything more than is possible with the force under his control. All that can be required of him, at least, is an honest effort to prevent the injury. In the event of quarrels between passengers the carrier's servants are not required to enter into the merits of any controversy between passengers, nor are they required to enter into a contest with the officers of the law to prevent the arrest of a passenger.[35] As stated supra, it is the duty of the carrier's servants to be at their proper places so that they may be able to render assistance if the same is needed.[36]

Rudeness and Bad Manners.—In traveling passengers must expect some discourtesies, and inconveniences, called forth by lack of decorum and good manners, but for these the carrier cannot be held liable. The rule seems to be that for rudeness, bad manners and the like the carrier cannot be held responsible, unless such conduct amounts to a breach of the peace. This is so because cars, steamboats and like means of transportation, are, and must be open to the masses, among whom there will be different degrees of intelligence and politeness; differences of physical vigor and temperament. In getting on and off of cars, boats and the like there is necessarily a certain amount of confusion, crowding, rudeness, haste, and selfish disregard of the feelings, nerves and comfort of others, and while these are often very annoying, and at times injurious, yet the carrier cannot be held responsible.[37]

Indecent Language and Conduct.—For indecent exposure and the use of profane language the carrier is liable, if the carrier's servants had knowledge of the same, and could have by the use of diligence prevented or mitigated it.[38] It is the duty of the carrier to provide a respectable and decent place for the transportation of passengers, and a passenger who is obliged to hear indecent and profane language, and to witness disorderly and indecent conduct is entitled to all damages suffered. And this is true although suffering no actual bodily injury.[39] In the case of Houston,

(29) See citations at (26).

(30) 55 N. Y. 108.

(31) Putnam v. Broadway, etc., Co., 55 N. Y. 108.

(32) See citations at (26).

(33) Pittsburg, etc., Co. v. Hinds, 91 Am. Dec. 224.

(34) Pittsburg, Fort Wayne, etc., Co. v. Hinds, 91 Am. Dec. 224; Flannery v. Railroad Co., 4 Mackey, 111; New Orleans, St. Louis, etc., Ry. Co. v. Burke, 24 Am. Rep. 689.

(35) Duggan v. Baltimore & Ohio Ry. Co., 159 Pa. St. 248.

(36) Wright v. Chicago, B. & Q. Ry. Co., 35 Pac. 196.

(37) Graff v. Philadelphia & Reading Co., 161 Pa. St. 230; Ellinger v. Philadelphia, Wilmington, etc., Co., 153 Pa. St. 213; Fritz v. Southern Ry. Co., 44 S. E. Rep. 613; Chicago & Western Ry. Co., 90 Ill. 586.

(38) 5 Am. & Eng. Ency. of Law, 556; St. Louis, etc., Co. v. Mackie, 10 Am. St. Rep. 766 (Tex.); Houston, etc., Ry. Co. v. Perkins, 52 S. W. 124 (Tex.); Lucy v. Chicago & G. Western, 65 N. W. 944 (Minn.); Batton v. South & North Ala. Ry. Co., 77 Ala. 591; Kinney v. Louisville & Nashville Ry. Co., 34 S. W. 1066.

(39) See citations at (38); St. Louis, etc., Co. v. Mackie, 10 Am. St. Rep. 766 (Tex.).

etc., Ry. Co. v. Perkins,[40] the court said: "A passenger may recover for mental suffering, unaccompanied by physical pain, caused by vulgar, profane and indecent language of other passengers which might have been prevented by the servants of the carrier." In the case of St. Louis, etc., Company v. Mackie,[41] the court said: "A railroad company cannot subject passengers, even in a second-class car, to noxious influences not necessarily nor ordinarily incident to such travel, but brought about by the wrongful acts of other passengers, which the company, by the exercise of proper care and due regard for the welfare of passengers, could prevent, without liability for injury resulting from such cases. These things carriers of passengers ought not to permit in vehicles in which they undertake to transport decent men, much less refined and delicate women; and if they do, when they could prevent them by the use of due care, they must respond in damages."

Drunken Passengers.—It is the duty of a carrier of passengers to eject from its conveyance a drunken passenger before he has committed any wrongful act or acts, if because of his condition, there is any reason to believe that he will injure or annoy the other passengers. In dealing with these passengers the carrier is held to a very high degree of care, and while mere drunkenness is not sufficient to raise a presumption of violence, yet if the drunken passengers are in any way boisterous, indecent, or conduct themselves in a dangerous manner it is the duty of the carrier's servants to remove them, or at least place them in such a position that they cannot injure anyone.[42]

Insane Passengers.—Where a passenger is insane and the carrier knows that such condition exists, it is the duty of the carrier to refuse to carry the insane person, but if the carrier accepts an insane person with knowledge of the facts, or allows the person to remain a passenger after having learned the facts, the carrier is held liable for all wrongful acts of such passenger, even though the carrier's servants do not know that an assault is being committed or threatened.[43] Mr. Fetter in his work on "Carriers of Passengers" states the rule as follows: "A railroad may carry insane passengers, but so long as the passenger is upon the train the carrier must do all in the way of restraint or isolation that can reasonably be demanded for the safety and comfort of the passengers. If the company knows the passenger to be insane, and that he may do violence at any moment, it is the duty of the carrier to exercise proper restraint, although at the time he may be quiet and apparently harmless.[44]

Damages Recoverable.—As a rule the courts allow the recovery of such damage as will compensate the injured party for his or her physical and mental suffering, loss of time, and necessary expenses. Ordinarily a carrier is not liable in exemplary damages unless, there has been a wilful refusal or absolute failure to perform the duties devolving on the carrier.[45] In the case of Flannery v. The Railroad Company,[46] the court in speaking on the question of damages said: "When the agents of a railroad company are guilty of conduct which is malicious or is intentionally negligent so as to amount to reckless disregard of the rights of a passenger, a jury may award exemplary damages."[47]

In conclusion it might be stated that the

(40) 52 S. W. 124.

(41) 10 Am. St. Rep. 766.

(42) Putnam v. Broadway, etc., Ry. Co., 55 N. Y. 108; Quinn v. Louisville & Nashville Co., 34 S. W. 742; Galveston, Houston, etc., Ry. Co. v. Long, 36 S. W. 485; 5 Am. & Eng. Ency. of Law, 558; Kinney v. Louisville, etc., Co., 34 S. W. 1066; New Orleans, etc., Ry. Co. v. Burke, 24 Am. Rep. 689.

(43) Meyer v. St. Louis, etc., Ry. Co. 54 Fed. 116; St. Louis, etc., Ry. Co. v. Greenthal, 77 Fed. 150; King v. Ohio, etc., Ry. Co., 22 Fed. 413; Holly v. Atlantic, etc., Ry. Co., 34 Am. Rep. 97 (Ga.); 6 Cyc. 603.

(44) Fetter Carriers of Passengers, Volume 1.

(45) Flannery v. Railroad Co., 4 Mackey, 111; New Orleans, etc., Ry. Co. v. Burke, 24 Am. Rep. 689; Murphy v. Western, etc., Ry. Co., 23 Fed. 37; St. Louis, Arkansas, etc., Co. v. Mackie, 71 Tex., 637; Northern Commercial Co. v. Nestor, 138 Fed. 383.

(46) 4 Mackey, 111.

(47) Flannery v. Railroad Co., 4 Mackey, 111.

number of cases in which carriers are held liable for the wrongful acts of fellow passengers is rapidly increasing, and it is interesting to follow the development, and expansion of the doctrine.

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CORPORATIONS—LICENSING FOREIGN CORPORATIONS.

HAUGHTON ELEVATOR & MACHINE CO. v. DETROIT CANDY CO., Limited.

Supreme Court of Michigan, March 16, 1909.

In determining whether a contract by a foreign corporation requires a business to be carried on within the state, or whether it affects interstate commerce, the contract must be construed as a whole.

Plaintiff is a foreign corporation, with its plant and offices at Toledo, Ohio. Its business is the manufacture, construction, and installation of freight and passenger elevators. It maintains no office in this state. The defendant is a partnership association, limited, under the laws of Michigan, and doing business in Detroit.

On March 27, 1907, defendant accepted a proposition made to it by plaintiff on March 7th. The acceptance made a complete and binding contract. By it plaintiff agreed "to furnish and erect in defendant's building in Detroit, one belt-connected electric freight elevator in accordance with the following specifications." It is unnecessary to state the specifications any further than to say that defendant agreed to furnish in place all necessary supports, guideposts, and sheave beams, to do all cutting of floors, walls, and masonry, to provide clear and unobstructed room for the placing of elevator with belongings and attachments, and to allow plaintiff the unobstructed use of space while installing elevator. The contract also provided: "For the old elevator, we are to furnish and erect parts as follows: Guide posts, weight guides, guide strips, overhead sheave beams. To cut platform to fit hatch 5 ft. 6 in. wide by 4 ft. 2 in. deep, with wire wainscoting 6 ft. high on three sides. Repair and install three automatic gates; using your motor, controller and reversing switch and erect elevator ready for your wires and cut out switch, all in good working order. You to prepare hatchways and do other work same as specified for new elevator in this contract." The day following the making of this contract, plaintiff telegraphed defendant canceling it. This suit is brought to recover damages for breach of contract. The court directed a verdict for the defendant, for the reason that the plaintiff, a foreign corporation, was doing business in Michigan contrary to Act. No. 34, p. 40, of the Public Acts of 1903, which forbids any foreign corporation to do business in Michigan "unless it shall first have filed and recorded in the office of the Secretary of State a certified copy of its charter or articles of incorporation." The defendant rested its case without producing any testimony.

It appears from the evidence on the part of the plaintiff that it has a capital stock of $25,000; that it does not manufacture the motor and the controller, or the ornamental parts, or the cables or the leather belts, but buys them. It does its assembling and shipping in and from Toledo, and sends its elevator to the place ordered. It would have taken about two weeks to put in the elevator, and about a week to do the repair work. The men employed would have been a millwright and two helpers. Its manager further testified that plaintiff might hire labor in Detroit if it needed more than it could send from Toledo; that it had done so occasionally; and that it might be compelled to buy a few things in Detroit, such as nails, bolts, hinges, and lumber. "We were to do the repair work here in Detroit on the Gardner elevator. We were not connected with that elevator company. We were perfectly willing to make the changes in that elevator, whatever changes were necessary, not whatever they required. We should make such changes as were necessary. We were to do that work in Detroit and with the labor here. Also to make use of any stuff that they might have, and take back or buy of them or credit them for it."

GRANT, J. (after stating the facts as above): In determining whether the contract sued upon described a business to be carried on within this state, and therefore within the prohibition of the statute, or whether it involved the business of interstate commerce, the contract must be construed as a whole. It is indivisible. Plaintiff agreed to install a new elevator, which, under its evidence, would require about two weeks to install after the elevator and the necessary appliances were shipped to Detroit. By the same contract it also agreed to repair another elevator, which would take about a week's time. One price was made for the entire work.

If this contract were merely for the installation of a new elevator, plaintiff could urge with much reason that it was an act of interstate commerce, and did not fall within the

cases of Hastings Industrial Co. v. Moran, 143 Mich. 679, 107 N. W. 706, and Pittsburg Construction Co. v. West Side, etc., R. R. Co., 154 Fed. 929, 83 C. C. A. 501, 11 L. R. A. (N. S.) 1145, but within Milan Milling Co. v. Gorten, 93 Tenn. 590, 27 S. W. 971, 26 L. R. A. 135, and other similar cases. But repairs to buildings and machinery are in no sense interstate commerce. That part of the contract was to be performed wholly in Michigan. It can make no difference whether in doing such business the contractor hires his help in the state or from without, or whether he buys what articles he needs for repairs in the state or without. It is local business, and corporations who undertake such work, even in a single transaction, come within the prohibition of the statute. See Rough v. Breitung, 117 Mich. 48, 75 N. W. 147.

Judgment affirmed.

NOTE.—*Restrictions on Foreign Corporations Doing Business Within a State as Limited by Interstate Commerce.*—It, of course, is true that the restrictions, which statutes place upon a foreign corporation doing business within a state, are to the extent that they directly interfere with interstate commerce absolutely void. But it often becomes difficult to say whether a particular kind of business is within the shelter of the interstate commerce clause and therefore not a doing of business within a state so as to fall within the denunciation of the state law. As the interstate commerce clause is the superior act, it becomes more appropriate to consider whether a particular act is within its protection. This note, therefore, is concerned greatly with the presentation of some illustrative cases to show what may or not be deemed interstate commerce, assuming for the moment, that, if not, they fall within the denunciation of some state enactment regarding the carrying on of business by a foreign corporation, which has not obtained a license. This interference with interstate commerce is not to be merely incidental, as, for example, a state may prohibit a foreign corporation from carrying on manufacturing within a state intending to sell its products there and elsewhere—in other words, where the foundation of commerce outside of the state is because the business of manufacturing is carried on within it. See Diamond Glue Co. v. U. S. Glue Co., 187 U. S. 611, 47 L. Ed. 328. Our inquiry is whether a particular transaction or series of like transactions in business amounts to doing business in a state not protected by the interstate commerce clause.

Some U. S. Circuit cases have held that these restrictive statutes mean generally that such business only is forbidden as that whereby the foreign corporation becomes in a sense domesticated in the state. Caesar v. Cappell, 83 Fed. 403; Sullivan v. Sheehan, 89 Fed. 247. But that sort of statement may narrow the matter too closely. Thus it was held that the sending of a man over to Kansas to make contracts with implement dealers in the state and then sending agents there to settle accounts and receive cash or notes in settlement thereof was doing business in Kansas within its restriction act. Elliott v. Parlin, 71 Kan. 665, 81 Pac. 500. This does not seem to partake greatly of the domestication idea—especially as these agents were under the supervision and control of a general agency established outside of Kansas. The case professes to adapt its ruling so as to be within the case of Lumbermen's Ins. Co. v. Meyer, 197 U. S. 407, 49 L. Ed. 810. In that case the facts show an insurance company organized in Pennsylvania with its office in Philadelphia. Written applications for policies were made to it and mailed from Rochester, N. Y., to its Philadelphia office; it had no offices or agents in New York and of its total risks, one-third were on property in New York. Policies were sent to applicants by mail from Philadelphia. In prosecuting its business and for increasing it, it was accustomed to send its general manager to the different conventions of lumbermen held in New York. It sends its adjusters to New York when a loss by fire occurs. Judge Peckham said: "A fire insurance company which issues its policies upon real estate and personal property situated in another state is as much engaged in doing business when its agents are there under its authority adjusting losses covered by its policies as it is when engaged in making contracts to take such ricks," as it does this "in furtherance of the contract." "We have no difficulty," said the justice, "in concluding that the defendant was doing business in New York during all the time of the existence of these policies."

The St. Louis Court of Appeals said in the case of Chicago Mill & Lumber Co. v. Sims, 101 Mo. App. 569, 574, 74 S. W. 128: "We might have a doubt as to whether the respondent company was transacting business within this state within the meaning of the law, if the evidence warranted the statement contained in its brief that it was engaged in manufacturing in the State of Illinois and only bought timber in Missouri to use in its factories. But there is no testimony that its Illinois business was of that character, as it is only shown to be an Illinois corporation which bought timber and lumber in Missouri and shipped it into Illinois." Where a Pennsylvania corporation came into the State of New Jersey and organized and controlled a corporation, causing it to issue to it bonds and stocks and with those bonds and stocks, or some of them, purchased stocks in various New Jersey corporations, and took from such persons certain sums of money and guaranteed that the controlled corporation would pay interest on such bonds, this was held to be the doing of business in New Jersey. Groel v. United Elec. Co., et al., 69 N. J. Eq. 397, 60 Atl. 822. In New York it was held that a foreign corporation was doing business there when it became a special partner in a limited partnership of that state. People v. Roberts, 152 N. Y. 59, 36 L. R. A. 756. If a foreign corporation merely insures its property situate in New York, this does not bring it within the statute. South Bay Co. v. Howey, 190 N. Y. 240, 83 N. E. 26. This question depends, however, on the purport of the statute rather than as bearing any relation to interstate commerce. A state statute may rightly require without infringing on interstate commerce that a corporation shall procure license where it contracts to furnish labor and material for construction work and in pursuance thereof sends laborers and employees and a superintendent into the state to perform the con-

tract. St. Louis Expanded Metal F. P. Co. v. Beilharz (Tex. Civ. App.), 88 S. W. 512. It has been held that a manufacturing corporation which regularly sells some of its goods through an agent in another state, does business in the latter states within the statutes in that regard. Cone v. Tuscaloosa Mfg. Co., 76 Fed. 891. In Idaho, it was held that if regular agent only makes contracts subject to approval at the home of the corporation, this makes a difference. Belle City Mfg. Co. v. Frizzell, 11 Idaho, 1, 81 Pac. 58. In Illinois, the regular or resident agent idea constitutes the doing of business in the state, such an agent not being in the category of drummers or traveling salesmen. March-Davis Cycle Mfg. Co. v. Lithographing Co., 79 Ill. App. 683. The rule in New York seems as decided in the Idaho case, supra. Crocker v. Muller, 83 N. Y. S. 189, 40 Wisc. 685; American Contractor Pub. Co. v. Bagge, 91 N. Y. S. 73. In Texas it is held that a foreign corporation placing its products in the hands of local merchants to be sold on commission does not bring it within a statute requiring a foreign corporation desiring to transact or solicit business in that state to obtain a permit. Allen v. Tyson-Jones Buggy Co., 91 Tex. 22, 40 S. W. 393. It was held in Minnesota as to a non-resident corporation maintaining an agency in that state for the storing and delivery of its farm machinery upon sales made by its traveling salesmen, the agent having no authority to sell property stored with it or receive orders therefor, was not required to be licensed. Rock Island Plow Co. v. Peterson, 93 Minn. 356, 101 N. W. 616.

On the line suggested by the principal case in reference to installation merely of an elevator, we find that it has been held in Illinois that the sale and delivery in that state of machinery and the furnishing of the time of a man to assist and superintend in the erection thereof is not transacting business there. Black-Clawson Co. v. Carlyle Paper Co., 133 Ill. App. 61.

For a foreign corporation to rent and fit up an office in a state, and place an agent in charge thereof for the purpose of soliciting persons to enroll for instruction by correspondence, with the agent collecting dues paid monthly for remittance, is a doing of business requiring license therefor. International Text Book Co. v. Lynch, 81 Vt. 101, 69 Atl. 541.

Under quite similar statutory provisions there are rulings, which are hard to distinguish upon the question as to whether they are not conflicting. Thus the Eighth Circuit Court of Appeals has held that if a foreign corporation has a factorage contract for a Colorado corporation to order, receive, store and sell its merchandise at the Colorado corporation's own expense, the former would not be doing business in Colorado within its statute. Butler Bros. Shoe Co. v. U. S. Rubber Co., 156 Fed. 1, 84 C. C. A. 167. While in Kentucky it was ruled that if a foreign corporation furnishes wagons to an agent on board cars in Ohio for sale in Kentucky under an "agent's commission contract," the corporation retaining title and requiring the proceeds to be kept separate as its funds, this constitutes a doing of business in Kentucky by the foreign corporation. Milburn Wagon Co. v. Com., 104 S. W. 323, 31 Ky. Law, 937. These cases are possibly distinguishable, but at all events such questions as these are constantly arising, and further than the general principle that we have referred to above, in reference to interstate commerce not being interfered with, little of substantive law may be found. Whether the statutes are so drastic as to bring any and every contract within their condemnation or look only to repetitions which tend to indicate a presence in a state of a foreign corporation in a domesticated way may depend greatly upon their respective phraseology. The Lumbermen Ins. Co. case, supra, decided by supreme court, did not directly refer to the New York statute requiring license from a foreign corporation, but the direct question involved was the obtaining of jurisdiction over a corporation by the reason of the fact of its doing business in a state, the first syllabus reading: "In order that a Federal Court may obtain jurisdiction over a foreign corporation, the corporation must, among other things, be doing business within the state." But we think that in essence the principle we are discussing is involved. The opinion was upon a certificate of division from a Circuit Court of Appeals and the opinion is interesting for the recital of facts it contains, and the general conclusion of corporate presence drawn therefrom. More particularly stress seems to be laid upon the fact that though no agencies were maintained and all applications for insurance were made to and policies issued from the home office, yet as it was provided that its adjusters should go to New York to adjust losses, then there was a contractual presence and doing of business. We do not see why the state might not compel the taking out of license. If so, this case becomes something of a landmark decision.

N. C. COLLIER.

JETSAM AND FLOTSAM.

NEW STANDARD OF REQUIREMENTS FOR ADMISSION TO THE BAR FROM CERTAIN SCHOOLS.

So much controversy is being aroused by the attempts of the bar associations to put into effect the new and stringent programs of the American Bar Association relative to law school requirements, that it might be well to call attention to this program:

The committee on legal education presented a report which was adopted. This report opposed the recognition of any degree of bachelor of laws granted by correspondence law schools or by day schools of less than three year courses or by night schools of less than four year courses.

The adoption of this program at the Seattle convention was obtained only after a considerable contest. "Debate on this report," says the Illinois Law Review, in describing the contest at the Seattle convention," brought out the usual arguments that one 'who has the stuff in him' will make a lawyer without any training, that some of the great lawyers of the past were self-trained and that the requirement of preliminary education and serious professional training is a hardship. It is significant that a meeting that had listened to several discussions of disrespect for law and for the courts, had considered a code of professional ethics, and had taken advanced ground against the dilatory and expensive procedure so dear to the rule-of-

thumb practitioner, rejected these arguments by decisive votes. The old individualist view, that considers only the applicant for admission to the bar, and is willing to let him fight it out with those already in practice whenever he deems himself ready, is passing with the passing of the laissez-faire idea on every hand. Courts can be suffered no longer to waste public time in serving as law schools. And, if they could, the experience of a century with the self-trained lawyer, whose juristic ideas are the product of hard knocks in the forum, has shown that something more than a good money-maker, sound business adviser and hard fighter in the courts is needed in the legal profession. Crude legislation, undignified forensic wrangling, dilatory and expensive procedure and popular indifference to law are the legitimate fruit of a theory that the training of lawyers is a matter of no public concern. President Jordan of Stanford University, dwelt on this point in his address before the Association of American Law Schools. And the paper of the German judge, Amtsrichter Karl von Lewinski, of Berlin, before the section of legal education, in which he described the long and thorough preparation exacted in the training of a German lawyer, coming after the discussion of the report of this committee, made a strong impression."

PRIVILEGED COMMUNICATIONS CONCERNING CANDIDATES FOR PUBLIC OFFICE.

The recently reported decision of the Supreme Court of Kansas in Coleman v. MacLennan (November, 1908), 98 Pac. 281, calls attention to a judicial controversy over the extent of the privilege as to publication of communications regarding public officers or candidates for public office. The turning point of such controversy is indicated by the following language from the opinion:

"There is great diversity of opinion regarding the extent to which discussions of the fitness of candidates for office may go. In England and Canada the limit is fixed at criticism and comment, which, however, may be severe, if fair, and may include the inferring of motives for conduct in fact exhibited if there be foundation for the inference. In some of our own states the rule is more liberal, while in others it is more narrow. According to the greater number of authorities, the occasion giving rise to conditional privilege does not justify statements which are untrue in fact, although made in good faith, without malice and under the honest belief that they are true. A minority allows the privilege under such circumstances."

The Kansas court, following a previous decision of its own, adopts the minority view, holding that untrue statements made in good faith are not actionable. The opinion is long and elaborate and has the labored effect of an attempt to bolster up a weak cause. We approve of the majority view, to which it would seem the law of New York conforms. One of the cases most frequently cited in support of the "majority view" is Post Pub. Co. v. Hallam, in the U. S. Circuit Court of Appeals, Sixth Circuit, 59 Fed. 530. The following is from the opinion in that case:

"The existence and extent of privilege in communications are determined by balancing the needs and good of society against the right of an individual to enjoy a good reputation when he has done nothing which ought to injure it. The privilege should always cease where the sacrifice of the individual right becomes so great that the public good to be derived from it is outweighed. Where conditional privilege is extended to cover a statement of disgraceful fact to a master concerning a servant or one applying for service, the privilege covers a bona fide statement on reasonable ground to the master only, and the injury done to the servant's reputation is with the master only. This is the extent of the sacrifice which the rule compels the servant to suffer in what was thought to be, when the rule became law, a most important interest to society. But, if the privilege is to extend to cases like that at bar, then a man who offers himself as a candidate must submit uncomplainingly to the loss of his reputation, not with a single person or a small class of persons, but with every member of the public, whenever an untrue charge of disgraceful conduct is made against him, if only his accuser honestly believes the charge upon reasonable ground. We think that not only is such a sacrifice not required of every one who consents to become a candidate for office, but that to sanction such a doctrine would do the public more harm than good. We are aware that public officers and candidates for public office are often corrupt when it is impossible to make legal proof thereof, and, of course, it would be well if the public could be given to know, in such a case, what lies hidden by concealment and perjury from judicial investigation. But the danger that honorable and worthy men may be driven from politics and public service by allowing too great latitude in attacks upon their character outweighs any benefit that might occasionally accrue to the public from charges of corruption that are true in fact but are incapable of legal proof. The freedom of the press is not in danger from the enforcement of the rule we uphold. No one reading the newspaper of the present day can be impressed with the idea that statements of fact concerning public men and charges against them are unduly guarded or restricted; and yet the rule complained of is the law in many of the States of the Union and in England."

On the score of the public good there is not only the consideration above emphasized that worthy men would be deterred from aspiring to the public service if they realized they thereby subjected themselves to being lied about with impunity. The further ground should not be overlooked that the legitimate and desirable influence of the press itself would be diminished, because the public would say that all newspapers are liars, and little credence would be given to derogatory statements about public officers, or candidates, that were true and ought to weigh seriously with citizens going to the polls.

In Hamilton v. Eno, 81 N. Y. 116, it was laid down that the rules of privileged utterance concerning a public officer are the same as those applying to candidates for public office; "and the law of libel must be the same in each case." It is conceded that official acts may be freely criticised and sarcasm and ridicule employed. It is, however, held "that the occasion will not of itself excuse an aspersive attack upon the character and motives of the officer, and that to be excused the critic must show the truth of what he has uttered of that kind."—New York Law Journal.

PRACTICE OF LAW BY CORPORATIONS.

"A shoemaker's family goes without shoes," describes conditions more applicable to the lawyer and his lack of attention to the protection of his own interests than to any other class or profession.

It is only recently that the encroachment of corporations on the domain of the legal practitioner has attracted any general attention from the profession, but that lawyers are at last awakening to the gravity of the competition which menaces them is evidenced by letters appearing in the New York Law Journal (See New York Law Journal, February 26 and March 4), and by discussions in the public print.

Numerous corporations and trust companies are now advertising under charter grants to "Manage and conduct any legal actions, proceedings and business relating to any of the purposes herein mentioned * * * represent and protect the same, or the owners, etc., before any board, body or tribunal, judicial or otherwise, etc."

Nothing so far as appears in the articles of incorporation indicate that the incorporators are licensed attorneys, and, as a rule, the majority, if not all, of such incorporators are laymen.

Where in the sister profession of medicine corporations have been organized to alleviate the sufferings of which flesh is heir to, the legal profession has gallantly come to the aid of licensed practitioners and secured judicial decisions restricting and restraining such corporations from holding themselves out as prepared to treat ailments.

In People, etc., v. John H. Woodbury Dermatological Institute, 124 App. Div. 877, the court said, referring to the requirements of the medical law providing that no person should practice medicine until registered and legally authorized or licensed by the regents: "The whole object of this act is clearly to restrict the practice of medicine to those therein authorized. Section 2 expressly provides that no person shall practice medicine unless registered and licensed as therein provided. It could not have been the intention of the Legislature to restrict an individual from practicing medicine unless he had complied with the very careful provisions of the act for testing his competency to so practice, and yet allow a corporation through its agents to practice without any examination or license whatever. Such a construction would be against the avowed and clearly expressed intention of the Legislature. * * * The purpose of that part of the medical law relating to the practice of medicine is to regulate the qualifications of a physician and prescribe what attainments he shall possess before being permitted to practice. Manifestly the necessary attainments are such as only a natural person can acquire. No corporation can ever qualify itself to practice medicine, and hence I do not think the legislature intended to include a corporation in any of the provisions of the law."

A case also in point relates to the practice of dentistry. In Hannon v. Siegel-Cooper Co., 167 N. Y. 244, Cullen, J., said: "The Public Health Law, by section 164, makes it a misdemeanor for any person to practice or to hold himself out to the public as practicing dentistry in any county in this state without being licensed to practice as such and registered in the office of the clerk of the county, and it would seem that the action of the defendant in assuming to carry on the business of dentistry was illegal and ultra vires."

The statutes providing for admission to the bar and to the practice of law are fully as strict as those pertaining to the professions of medicine and dentistry.

The relation of attorney and client is one hedged about with many safeguards to the client. Confidential communications are protected. Ability to protect clients' interests is assured by requirement of a long and arduous preparation and by a careful examination of the proficiency of applicants for admission to the bar. The oath administered on issuance of license and the ethics of their profession require of attorneys an observance of honorable ideals in the practice of their vocation. None of these restrictive influences hamper the corporation seeking legal work. Soulless, its only excuse for existence is to make money. Incorporators may be ex-felons or recognized confidence men. Their profits must depend on their securing services of attorneys authorized to appear in court for litigants for a sum less than paid by such litigants for their services, and such attorneys are subject to dismissal by employing corporation.

Obviously the relations of attorney and client do not exist in corporation conducted litigation. The right of attorneys to appear in such cases will undoubtedly be brought into question in the near future. Weeks on Attorneys, says, sec. 200: "The attorney must be actually employed for the purpose before he can represent the party in court. The relation of client and attorney must subsist between them. That relation cannot be created by the attorney alone." Also sec. 327, "the appointment of an attorney is strictly personal and cannot usually be made by deputy."

An unqualified person who acts as solicitor is guilty of contempt of court, although he acts in the name and with the consent of a duly qualified solicitor. L. R. 9 Q. B. Div. 1.

One of the essential elements, as has been stated, of the relation of an attorney and client is that the attorney must have the whole and exclusive charge of the conduct of the business and be chargeable with all the responsibility therefor. Such relations are incompatible with the conditions under which such business is entrusted to the corporation by the client.

If corporations for business are to be restrained from engaging in the practice of medicine, it seems strange that attorneys should not equally be protected from corporation competition in the practice of law.—Law and Commerce.

CORRESPONDENCE.

MINOR WIFE'S DEED AS AFFECTING CURTESY.

Editor Central Law Journal:

I should like to have the views of my fellow-readers of your valuable journal upon the following interesting question, and would, therefore, appreciate it highly if you would insert this communication in your correspondence column.

A, a minor, and married at the time to B, owns real estate. Under the statute law of North Carolina, and the decisions of its courts,

the husband has no interest in his life's real estate prior to her death, although children may be born before her death; he simply has, after her death, a life estate by curtesy. A married woman, however, cannot pass her real estate unless her husband joins in the deed. A, under these circumstances, being under age, as stated, B, then of age, joining in the deed, conveys A's real estate. A dies, leaving surviving B and children of herself and B. A, at the time of her death, is still a minor.

The question is, has the deed the effect of passing B's curtesy estate in the land? Or, otherwise stated, would not the proper construction of the deed be, as being the only intent of the parties at the time of its execution, that it could only operate as against the interest of A, and that, if invalid because of her minority, it would be treated as void? I am inclined to think that the answer to this last question should be in the affirmative, particularly on this consideration: If a suit had been brought by the wife to set aside the deed during her lifetime, it would have, if set aside at all, been set aside absolutely, so as to put the title in A, without any embarrassment to it arising out of any supposed interest of B, which could be said to have passed by the deed; otherwise, if the court held the deed good as against B, it would be holding that B had some interest during his wife's lifetime in the real estate, whereas, the law of the state is well settled that he had not, and the court, if it did not declare the deed void absolutely, would not be giving to A the same rights to avoid her conveyance in toto as it gives to other minors. This argument shows that the grantee, under the deed, by a proper construction of it, got nothing as against B, and, if that was the proper construction of the deed at the time it was executed, and during A's lifetime, a different construction cannot be given to it because of A's death.

Very truly yours,

F. W. THOMAS.

Asheville, N. C.

CLASS LEGISLATION UNDER THE POLICE POWER.

Editor Central Law Journal.

I have just read your able editorial headed "The Public Health Bills of the American Medical Association." Permit me to comment on same.

It might strike the average lawyer that instead of antagonizing the proposed legislation as you have in the editorial, it would be a good thing to support it, and after the passage of the "Mann bill," then it would be up to the lawyers to introduce and secure the passage of bills prohibiting the publication of the various business manuals and form books, so as to prevent the farmers and business men from drawing their own wills, contracts, deeds, etc., and thus stop the layman from interfering with the business of the legal fraternities and the prescribing of business remedies by themselves, the same as the doctors propose to prevent the layman from prescribing for his own physical ills and interfering with the business, should the Mann bill pass and become a law. Very truly,

CHAS. W. FERGUSON.

Rockford, Ill.

(Mr. Ferguson's idea will strike many a practical lawyer as a good one. For, certainly, there has been considerable just indignation against the interference by laymen with the business of the lawyer, and certainly if the doctors are to have legislation that will keep the people from self-medication the lawyer should be protected in the same manner from lay interference. But to the great credit of the legal profession, although entrusted by the people with the controlling influence in both national and state legislatures, the tendency of legislation, so far as it has affected the legal profession, has made it easier for the people not only to avoid litigation altogether, but to handle their own litigation through lower courts, especially provided for their accommodation. In the "good old times" when the intricacies of common law pleading made even the expert lawyer tremble as he ventured into its mazes, no layman would even think of conducting his own litigation, even in the preliminary stages. Now, with our simplified pleading and our justice courts, laymen of average intelligence can successfully conduct their own cases in matters which are free from complications. And who made all this possible? The legislatures of our states, in which the legal profession has always been predominant.

Now, while we are in favor of curbing to some extent outside interference with the lawyers' business, such as the drawing of wills and the transaction of probate and trust business by corporations, we are not in favor of destroying that implicit confidence with which the people have so honored our profession by taking advantage of the influence with which we are intrusted and legislating selfishly in our own interest at the expense of the people. For that reason, also, we are opposed to selfishness of the medical profession, when, in seeking the legislation referred to in our recent editorial, they attempt to shut out all competition of a legitimate nature with their own high-priced service. At least, where, in order to secure legislation intended to benefit exclusively any one class or profession, at the expense of the people it is necessary to invoke the police power as a justification, we emphatically set our face against it and oppose it on the principle that if one class can use this great power for their own selfish aggrandizement, all classes, trades and professions may do the same.—Ed.)

HUMOR OF THE LAW.

"Still, there are occasions when a lawyer isn't the chief beneficiary of a suit," said Mrs. Stonewall Jackson. "I know of one instance. A friend of mine in Virginia sued a railroad company for damages and secured a verdict for $50,000, which was paid, and the whole amount is now in bank subject to her order. Her counsel didn't get a penny of it."

"How was that?"

"She found the only way of outwitting him—she married the lawyer."

Magistrate—"You are accused of attempting to hold a pedestrian up at two o'clock this morning. What have you to say in your behalf?"

Prisoner—"I am not guilty, your Honor. I can prove a lullaby."

Magistrate—"You mean an alibi?"

Prisoner—"Well, call it what you like, but my wife will swear that I was walking the floor with the baby at the hour mentioned in the charge."

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort and of all the Federal Courts.

1. **Accord and Satisfaction**—Part Payment.—A creditor who accepts a sum tendered as full payment of an account after the debtor has deducted the amount of a disputed unliquidated claim cannot sue on the account.—Ravenswood Paper Mill Co. v. Dix, 113 N. Y. Supp. 721.

2. **Account Stated**—Nature.—An account rendered becomes an account stated only when it has been examined, and the balance admitted, without having been paid.—McGraw v. Traders' Nat. Bank. W. Va., 63 S. E. 398.

3. **Action**—Recovery of Installments.—Where payments are to be made periodically, separate actions may be maintained in succession for installments as they mature; but all sums due when an action is begun must be included in it.—Puckett v. National Annuity Ass'n, Mo., 114 S. W. 1039.

4. **Adverse Possession**—State Lands.—Where an entryman entered as a naked trespasser, and thereafter obtained a grant for more land than he occupied, his occupancy thereafter extended to the boundaries described in the grant.—Breckenridge Cannel Coal Co. v. Scott, Tenn., 114 S. W. 930.

5. **Agriculture**—Farm Laborer.—A woman employed in housework on a farm held not a farm laborer, within Rev. Codes 1905, Sec. 6277.—Lowe v. Abrahamson, N. D., 119 N. W. 241.

6. **Animals**—Running at Large.—Allowing a vicious horse to eat in the street unattended and unhitched while attached to a wagon held not a negligent permitting of the animal to run at large such as would render the owner liable for damages caused by it.—Corcoran v. Kelly, 113 N. Y. Supp. 686.

7. **Appeal and Error**—Bill of Exceptions.—An order extending the time for serving a bill of exceptions for "good cause shown" is conclusive on appeal, in the absence of the evidence on which it was granted.—City of Chamberlain v. Quarneberg, S. D., 119 N. W. 1026.

8.——Conflicting Evidence.—A finding on conflicting evidence will not be reversed on appeal, where the Supreme Court cannot say that there is a preponderance of the evidence against it.—Peever Mercantile Co. v. State Mut. Fire Ass'n of Canton, S. D., 119 N. W. 1008.

9.——Curing Error.—Error in allowing damages for the wrongful detention of certain steers sued for held cured by plaintiff's remission of all such damages.—Kime v. Bank of Edgemont, S. D., 119 N. W. 1003.

10.——Decisions of Intermediate Courts.—Where appellant in the Supreme Court was appellee in the Appellate Court, but failed there to assign cross-error on a ruling of the trial court, it is not reviewable on appeal to the Supreme Court.—Commercial Loan & Trust Co. v. Mallers, Ill., 86 N. E. 728.

11.——Dismissal of Appeal.—An appeal should not be dismissed for failure to except to the findings of the court, as the sufficiency of the findings to sustain the judgment is open to inquiry.—Hector v. Hector, Wash., 99 Pac. 13.

12.——Exceptions in Trial Court.—The right to rescind a contract of sale for a mere breach of warranty will not be reviewed when not raised in the trial court.—Baker v. Robbins, Wash., 99 Pac. 1.

13.——Exclusion of Testimony.—Any error in excluding testimony was harmless where the fact sought to be shown was developed by other evidence.—Iowa Nat. Bank of Ottumwa, Iowa, v. Sherman, S. D., 119 N. W. 1010.

14.——Findings of Court.—The trial court's finding will be sustained, though there was a conflict in the evidence.—Foster County State Bank v. Hester, N. D., 119 N. W. 1044.

15.——Findings of Fact.—Under Rev. Code Civ. Proc. Sec. 293, and Rev. Civ. Code, Sec. 2465, held not necessary to take an exception to findings of fact to have the sufficiency of the evidence determined on appeal.—Kelly v. Wheeler, S. D., 119 N. W. 994.

16.——Jurisdictional Questions.—The Supreme Court of its own motion may interpose the objection of want of jurisdiction over the subject-matter at any stage of the proceedings.—Allott v. American Strawboard Co., Ill., 86 N. E. 685.

17.——Prejudice.—Overruling a demurrer to an affirmative answer or reply is error without prejudice, where no proof is offered in support of the affirmative pleading.—Farrandini v. Bankers' Life Ass'n of Des Moines, Iowa, Wash., 99 Pac. 6.

18.——Reception of Evidence.—The reception over objection of testimony not responsive to a question held not reversible error, where all the facts testified to were material and would have been admissible if in response to proper questions, and no motion to strike was made.—Gaffney v. Mentele, S. D., 119 N. W. 1030.

19.——Review.—A party cannot complain of a finding of fact which is equivalent to one requested by himself.—St. Paul M. & M. Ry. Co. v. Howard, S. D., 119 N. W. 1032.

20. **Assignments**—Delivery of Assignment.—An assignment by a debtor corporation to its creditor held invalid as against a creditor who attached one of the assigned claims before delivery of the assignment.—Nixon v. Joshua Hendy Mach. Works, Wash., 99 Pac. 11.

21. **Asylums**—Maintenance.—That the state institution for the feebleminded is a state in-

stitution does not require that funds for its maintenance shall be raised as prescribed by Const., Sec. 174, nor preclude the Legislature from providing for its partial or entire maintenance by the respective counties.—State v. Lewis, N. D., 119 N. W. 1037.

22. **Attorney and Client**—Agreement to Nolle Prosequi.—The district attorney's agreement to enter a nolle prosequi at a subsequent term held to entitle persons who advanced money to accused's attorney to cover expenses, etc., to a settlement.—Lizotte v. Dioska, Mass., 86 N. E. 774.

23. **Bankruptcy**—Preferences.—In an action by a trustee in bankruptcy to recover preferences paid, the record of the allowance of claims by the referee was admissible to prove the bankrupt's indebtedness, though defendant was not a party to those proceedings.—Cree v. Bradley's Bank of Mystic, Iowa, 119 N. W. 614.

24. **Banks and Banking**—Rules of Bank.—Reasonable rules, made by a savings bank for the regulation of its business, should not be interfered with by the courts without substantial reason therefor.—Rosenthal v. Dollar Savings Bank of City of New York, 113 N. Y. Supp. 787.

25. **Bills and Notes**—Accommodation Note.—If the holder of a note is an accommodation maker thereof for the benefit of an indorser in blank, whose proper debt it is to pay, the holder's remedy is an action for money paid, and not on the indorsement.—Abramowitz v. Abramowitz, 113 N. Y. Supp. 798.

26. **Building and Loan Associations**—Insolvency.—The insolvency of a building association holding mortgages to secure loans to members who assigned their stock as collateral held to render the same payable immediately.—New Jersey Bldg., Loan & Inv. Co. v. McNulty, N. J., 71 Atl. 493.

27. **Burglary**—What Constitutes.—Breaking and entering to commit theft constitutes "burglary," notwithstanding a subsequent abandonment of the undertaking.—Schwartz v. State, Tex., 114 S. W. 809.

28. **Carriers**—Misdelivery.—That a carrier was not notified of the transfer of the bill of lading within a reasonable time during which the carrier could have recouped its loss against the consignor held no defense to an action for misdelivery.—Sheldon v. New York Cent. & H. R. R. Co., 113 N. Y. Supp. 676.

29.——Risk of Passenger.—The lurching or rocking of trains in passing rapidly over curves on the road resulting from the natural laws of motion is one of the risks which a passenger assumes.—Norfolk & W. Ry. Co. v. Rhodes, Va., 63 S. E. 445.

30. **Collision**—Failure to Display Lights.—Where there is no statute, municipal ordinance, or harbor regulation requiring the display of signal lights on a vessel at a particular time, or under given circumstances, it is not negligence per se not to display them.—Carscallen v. Coeur d'Alene & St. Joe Transp. Co., Idaho, 98 Pac. 622.

31.——Negligence.—In an action for damages by collision between two boats, the test of negligence is, Was he negligent in doing the particular thing he did do under the circumstances confronting him?—Carscallen v. Coeur d'Alene & St. Joe Transp. Co., Idaho, 98 Pac. 622.

32. **Conspiracy**—Election Frauds.—Where there is a design to procure a disqualified person to vote, followed by an overt act, the conspiracy held complete, though the person does not actually vote.—State v. Nugent, N. J., 71 Atl. 485.

33. **Constitutional Law**—Punishment for Contempt.—It is not "due process of law" to condemn a party charged with contempt not committed in the presence of the court without giving him an opportunity to defend himself.—Hohenadel v. Steele, Ill., 86 N. E. 717.

34.——Validity of Statutes.—While courts should be very cautious in holding acts invalid, they must protect the public and the members of the Legislature from being imposed on by violation of constitutional provisions intended to protect them.—Somerset County Com'rs v. Pocomoke Bridge Co., Md., 71 Atl. 462.

35. **Contempt**—Decree of Court.—Where a decree requires trustees to pay dividends and income from the trust estate collected by them, the trustees cannot excuse non-payment by showing that no part thereof is available for that purpose.—Jastram v. McAuslan, R. I., 71 Atl. 454.

36. **Contracts**—Consideration.—In determining whether the compromise of a pending suit is a good consideration for a promise, the good faith of the claimant is material, and as a general rule, should be the test of its validity.—Osborne v. Fridrich, Mo., 114 S. W. 1045.

37.——Majority Stockholders.—Contract of majority stockholders to sell without knowledge or consent of minority stockholders all the property of the corporation held void, as against public policy.—Bias v. Atkinson, W. Va., 63 S. E. 395.

38. **Corporations**—Subscription to Stock.—In an action by an employee who had purchased stock in the employer corporation for breach of a stipulation in the contract of employment that defendant would repurchase the stock, the complaint held insufficient.—Meurer v. American Moving Picture Mach. Co., 113 N. Y. Supp. 719.

39.——Transfer of Stock.—As between the parties, the transfer of stock by delivery of the certificate, indorsed in blank or with power of attorney, passes title without transfer on the company's books, though the by-laws provide to the contrary.—McCarthy v. Crawford, Ill., 86 N. E. 750.

40. **Counties**—Liabilities of Counties.—Laws 1907, p. 374, c. 237, making a county liable for the support of inmates in the State Home for the Feeble-Minded, held not in violation of Const., sec. 172, providing that the fiscal affairs of a county shall be transacted by the county board.—State v. Lewis, N. D., 119 N. W. 1037.

41. **Courts**—Appellate Jurisdiction.—Where the construction placed by the Court of Civil Appeals upon a law puts that law in conflict with the Constitution of the United States, the validity of the law is involved, and an appeal will lie to the Supreme Court.—Albertype Co. v. Gust Feist Co., Tex., 114 S. W. 791.

42.——Presumptions.—As to courts of general jurisdiction, jurisdiction will be presumed unless the contrary appears.—Magee v. Big Bend Land Co., Wash., 99 Pac. 16.

43. **Criminal Evidence**—Dying Declarations.—The reception of evidence in the jury's presence, intended for the court to lay the foundation for a dying declaration, held not reversible error.—State v. Clark, W. Va., 63 S. E. 402.

44. **Deeds**—Presumptions.—There is no presumption of law that a conveyance from a parent to a child is procured by fraud or undue influence.—Hudson v. Hudson, Ill., 86 N. E. 661.

45. **Discovery**—Persons From Whom Discov-

ery Can Be Made.—The court has power to compel an attorney to disclose the name and residence of a client or an alleged client, but the power should be exercised pending the action, and while the relation of attorney and client actually exists between them.—In re Malcom, 113 N. Y. Supp. 666.

46. **Dismissal and Nonsuit**—Prejudice.—A judgment dismissing a cause without prejudice will not be vacated under Ballinger's Ann. Codes & St. Sec. 4953 (Pierce's Code, Sec. 424), on the sole ground that plaintiff did not know that the effect of the dismissal would preclude him from bringing another action on account of the bar of the statute of limitations.—Anderson v. Shields, Wash., 99 Pac. 24.

47. **Easements**—What Constitutes.—The right of an owner of an estate to erect a line of telephone poles over the estate of another for the benefit of the former is an easement.—Yeager v. Tuning, Ohio, 86 N. E. 657.

48. **Electricity**—Discrimination in Charges.—Allowance by an electric light company of a discount to a special class of customers, in lieu of furnishing and renewing lamps, held not an illegal discrimination.—Halpern v. New York Edison Co., 113 N. Y. Supp. 790.

49. **Eminent Domain**—Damages to Land Not Taken.—Damages resulting to an owner of land, no part of which has been physically taken under eminent domain, are not within the Eminent Domain Act, but the owner is remitted to his action at law.—Mercer County v. Wolff, Ill., 86 N. E. 708.

50. **Equity**—Bill of Review.—A decree entered by agreement can only be set aside by an original bill in the nature of a bill of review.—Hohenadel v. Steele, Ill., 86 N. E. 717.

51. **Estoppel**—Right of Guilty Party to Allege Fraud.—A party to a collusive or fraudulent proceeding cannot be heard to complain of its fraudulent nature on his own failure to profit by the transaction.—Dilley v. Jasper Lumber Co., Tex., 114 S. W. 878.

52. **Evidence**—Hypothecated Questions.—The answer of an expert to a hypothetical question held not objectionable on the ground that it assumed the existence of acts not in evidence.—Carroll v. Boston Elevated Ry. Co., Mass., 86 N. E. 793.

53.——Market Value.—On a claim for the value of a casket and funeral appliances, evidence as to the cost to manufacturers and dealers of the different parts of the casket unassembled held inadmissible.—Wagoner Undertaking Co. v. Jones, Mo., 114 S. W. 1049.

54.——Production of Public Records.—Production of public records, provable by certified copies, ordinarily will not be compelled.—City of Bluefield v. McClaugherty, W. Va., 63 S. E. 363.

55. **Executors and Administrators**—Funeral Expenses.—A widow may order the interment for her deceased husband on a scale in proportion to deceased's financial condition for which the estate will be liable.—Wagoner Undertaking Co. v. Jones, Mo., 114 S. W. 1049.

56. **Fire Insurance**—Interest and Liability of Policy Holders.—The policy holders in a mutual fire insurance company are members, and each has the same proportionate interest and liability.—J. P. Lamb & Co. v. Merchants' Nat. Mut. Fire Ins. Co., N. D., 119 N. W. 1048.

57.——Oral Contract.—An alleged oral contract of insurance was not enforceable, where the parties only contemplated the existence of a contract on delivery of the policies in payment of the premiums.—Cunningham v. Connecticut Fire Ins. Co., Mass., 86 N. E. 787.

58. **Fraud**—What Constitutes.—Fraud is a willful, malevolent act directed to perpetrate a wrong to the rights of another, and such an act in a vendor is actionable as against the mere negligence or inadvertence of the purchaser in failing to prevent fraud.—Judd v. Walker, Mo., 114 S. W. 979.

59. **Frauds, Statute of**—Leases.—Where a person took possession of premises under an oral agreement not binding under the statute of frauds, and was accepted as a tenant, the contract arising upon the creation of the tenancy was not affected by the statute of frauds.—Miles v. Janvrin, Mass., 86 N. E. 785.

60. **Gaming**—Burden of Proof.—In a trial for exhibiting gambling device, in violation of Kirby's Dig. Sec. 1732, the burden is on the state to show that accused was interested as "banker or exhibitor," and not merely as a participant.—Tully v. State, Ark., 114 S. W. 990.

61. **Guaranty**—Extent of Liability.—Guarantor's liability held to extend to the entire indebtedness with a limitation of liability of $1,000, and guarantor was not relieved from liability by a payment or realization from the security of a sum equal to or in excess of $1,000.—Foster County State Bank v. Hester, N. D., 119 N. W. 1044.

62.——Intention of Parties.—A contract of guaranty is to be construed like other contracts, and its language will not be extended by any strained construction to enlarge the guarantors' liability.—Finnucan v. Feigenspan, Conn., 71 Atl. 497.

63. **Guardian and Ward**—Appointment of Guardian by Will.—A decree of divorce, which gives to the wife the exclusive custody of a child, held to confer entire control on the wife, who may, under Hurd's Rev. St. 1908, c. 64, sec. 4, 5, appoint a testamentary guardian.—People v. Small, Ill., 86 N. E. 733.

64. **Health**—Police Power.—A city under its police power can declare a building infected with disease a public nuisance and have it destroyed, if that is the only method of preventing the disease from spreading.—Sings v. City of Joliet, Ill., 86 N. E. 663.

65. **Homestead**—Conveyance.—An attempted conveyance of the homestead by complainant's husband, without her joining therein, was void even as to the husband's community interest in the homestead, where no other homestead was acquired, and the property continued to be the homestead of the wife.—Marble v. Marble, Tex., 114 S. W. 871.

66. **Homicide**—Dying Declarations.—That a witness was permitted to testify that a dying declaration was made under oath held reversible error, as giving undue prominence to that fact.—State v. Clark, W. Va., 63 S. E. 402.

67.——Manslaughter.—If accused began the fatal quarrel and shot decedent because of previous ill will, or merely because he was afraid the latter would some time harm him, the killing would be murder, however excited, angry, or alarmed accused may have been at the time.—Arnwine v. State, Tex., 114 S. W. 796.

68.——Self Defense.—In a prosecution for homicide, an instruction that defendant in exercising the right of selfdefense must have acted honestly and in good faith held not calculated to confuse the jury, or disparage defend-

ant's right of self-defense.—Duncan v. State, Ind., 86 N. E. 641.

69. **Injunction**—Combination of Laborers.—A combination of laborers existing as a union for a specified purpose held an illegal combination and conspiracy, authorizing the person injured to obtain relief in equity by injunction.—Lohse Patent Door Co. v. Fuello, Mo., 114 S. W. 997.

70. **Innkeepers**—Liability for Property of Guests.—The innkeepers' act (Laws 1861, p. 133), exempting an innkeeper from liability for valuables not deposited, held not to apply where a guest had packed her goods to leave the hotel and given them to a porter sent to receive them.—Rockhill v. Congress Hotel Co., Ill., 86 N. E. 740.

71. **Interest**—Accounting.—Where defendants took certain property as trustees in extinguishment of a pre-existing debt, they were only entitled on a subsequent accounting to interest at the statutory and not at the contract rate.—Weltner v. Thurmond, Wyo., 98 Pac. 590.

72. **Interstate Commerce**—What Constitutes.—A contract to carry freight between two points within a state is "interstate commerce," where the carrier's line for some distance between the two points passes through another state.—Mires v. St. Louis & S. F. R. Co., Mo., 114 S. W. 1052.

73. **Intoxicating Liquors**—Illegal Selling.—Finding of intoxicating liquors on premises controlled or occupied by defendant in a prosecution for illegally selling such liquors held prima facie evidence of guilt under Kirby's Dig. Sec. 5141.—Appling v. State, Ark., 114 S. W. 927.

74.——List of Employees.—Act of dealer in intoxicating liquors in having about his place of business employees whose names were not listed with the county auditor, as required by the mulct law (Code, sec. 2448, par. 4), held a violation of law.—Pumphrey v. Anderson, Iowa, 119 N. W. 617.

75.——Removal Permit.—On application for a removal permit, that the licensee had agreed with manufacturers that he would not sell to their employees during certain hours was evidence that the location was unsuitable for a saloon.—Appeal of Bormann, Conn., 71 Atl. 502.

76.——Rules of Excise Board.—Rules of the excise board of the city of Lincoln within its authority, duly adopted and published, are of like force as ordinances adopted by the city council.—State v. Dudgeon, Neb., 119 N. W. 676.

77. **Judgment**—Jurisdiction of Person.—A decree against heirs of a decedent, without giving their names in the complaint or warning order, held void.—Indiana & Arkansas Lumber & Mfg. Co. v. Brinkley, U. S. C. C. of App., Eighth Circuit, 164 Fed. 963.

78.——Suit to Enforce Trust.—An action to establish and enforce a trust in corporate stock within the state held an action quasi in rem, so that substituted service on a nonresident defendant, as authorized by Code Civ. Proc. sec. 637 (Rev. Codes, sec. 6520), is sufficient.—Gassert v. Strong, Mont., 98 Pac. 497.

79. **Judicial Sales**—Collateral Attack.—The proof necessary to overthrow the recitals in a decree authorizing the sale of land must be clear and convincing.—Ladd v. Craig, Miss., 47 So. 777.

80. **Landlord and Tenant**—Lease.—Rights of parties to a lease providing for a renewal on notice held to have become fixed on the giving of the notice and an acceptance by the lessor.—Nutmeg Park Driving Corp. v. Fiske, Conn., 71 Atl. 499.

81. **Licenses**—Regulation of City Market.—The mayor and council of the city of Baltimore are primarily the judges of the reasonableness of a tax imposed on commission merchants for the privileges of the city market.—Meushaw v. State, Md., 71 Atl. 457.

82. **Limitations of Actions**—Trusts.—In a suit to enforce an express trust, limitations do not run until repudiation or adverse possession by the trustee and knowledge thereof by the beneficiary.—Weltner v. Thurmond, Wyo., 98 Pac. 590.

83. **Mandamus**—Dissolution of Injunction.—Mandamus is the proper remedy to compel the dissolution of a temporary injunction, improperly issued, where petitioner might suffer irreparable damage before the injunction could be otherwise dissolved.—Siegel v. Donovan, Mich., 119 N. W. 645.

84. **Master and Servant**—Contributory Negligence.—An employee attempting to pass beneath a rapidly moving belt at a point he was liable to be struck held guilty of contributory negligence.—Perkins v. Oxford Paper Co., Me., 71 Atl. 476.

85.——Independent Contractor.—Railroad company held liable, in all matters incident to the use of its tracks, for the negligence of the independent contractor in the construction of its roadbed.—Vickers v. Kanawha & W. V. R. Co., W. Va., 63 S. E. 367.

86.——Masters Duty in Selecting Servants.—Ordinarily the master discharges his whole duty to the servant when he uses ordinary care in the selection of his fellow servants and provides suitable tools, appliances, etc.—Schmelzer v. Central Furniture Co., Mo., 114 S. W. 1043.

87. **Mines and Minerals**—Action for Rent.—A coal mining lease construed, and held, that the lessee was not liable for the payment of a specified sum per ton for coal mined where the mine could not be operated at a profit.—Wilson v. Big Joe Block Coal Co., Iowa, 119 N. W. 694.

88. **Monopolies**—Combinations Prohibited.—At common law personal service, an occupation cannot be the subject of monopoly, and, unless there is property to be affected with a public interest, there is no basis for the fact or the charge of a monopoly.—Lohse Patent Door Co. v. Fuelle, Mo., 114 S. W. 997.

89. **Mortgages**—Effect of Taking New Security.—Person holding note and mortgage held not to lose his right to resort to that mortgage, to protect himself against subsequent liens, by the fact that he took another note and mortgage for the same debt.—Watson v. Bowman, Iowa, 119 N. W. 623.

90. **Municipal Corporations**—Defective Sidewalks.—The purpose and necessity stated of the statutory notice requiring the time, place, etc., of an injury resulting from a defective sidewalk to be stated in the claim to the city.—Sollenbarger v. Incorporated Town of Lineville, Iowa, 119 N. W. 618.

91. **Negligence**—Bite of Horse.—If a vicious horse was negligently left standing in the street and bit a passer-by, the vicious propensity of the horse, and not the leaving of the horse unattended, was the proximate cause of the injury.—Corcoran v. Kelly, 113 N. Y. Supp. 686.

92.——Building Approach.—One held not liable for injuries to a customer stumbling on account of the difference in the level of approaches to a building.—Hoyt v. Woodbury, Mass., 86 N. E. 772.

93. **Nuisance**—Excavations.—An excavation beside a sidewalk held to be a public nuisance.—Town of Newcastle v. Grubbs, Ind., 86 N. E. 757.

94.——Injunction.—The illegal use of premises as a bawdy-house constitutes a continuing injury to a nearby property owner, the right to restrain which is unaffected by lapse of time.—Seifert v. Dillon, Neb., 119 N. W. 686.

95.——Pollution of Water.—A criminal prosecution held not to lie against one building dams on his land for irrigation purposes, with the result that, when the water which had risen on the land of others receded, an offensive smell arose.—Stacy v. State, Tex., 114 S. W. 807.

96. **Parties**—Unborn Defendants.—Where an estate is vested in persons living, subject only to the contingency that persons may be born who will have an interest therein, the living owners of the estate represent the whole estate for purposes of any litigation in reference thereto.—Doscher v. Wyckoff, 113 N. Y. Supp. 655.

97. **Physicians and Surgeons**—Licensing Veterinary Surgeons.—Laws 1905, p. 463, c. 97, providing for the examination and licensing of veterinary surgeons, held not unconstitutional.—Ex parte Barnes, Neb., 119 N. W. 662.

98. **Pleading**—Demurrer.—Where defendant, after filing a demurrer to the declaration, files no further pleadings, and goes to trial without calling up the demurrer for disposition, he waives the demurrer, and cannot raise the objection for the first time after verdict.—Devine v. Chicago City Ry. Co., Ill., 86 N. E. 689

99.——Rulings on Demurrer.—A defendant who voluntarily amends or substitutes an answer after demurrer sustained waives the right to except to the sustaining of the demurrer.—Pettus v. Gault, Conn., 71 Atl. 509.

100. **Pledges**—Collection of Dividends by Pledgee.—The dividend on corporate stock may be collected by the pledgee of the stock.—Union Trust Co. v. Hasseltine, Mass., 86 N. E. 777.

101. **Principal and Agent**—Fraud of Agent.—An agent for the purchase of land made a secret agreement with the vendor or his attorneys to influence the sale, contrary to his principal's interest, such agreement was unconscionable and unenforceable.—Egan v. De Jonge, 113 N. Y. Supp. 737.

102. **Public Lands**—Survey.—Where an original survey contained an insufficient acreage, a subsequent entryman could not object that the original entryman might thereafter exercise his right to mandamus to compel the extension of his lines.—Breckenridge Cannel Coal Co. v. Scott, Tenn., 114 S. W. 930.

103. **Quieting Title**—Adverse Possession.—Where one in possession, without color of title, of a part of a tract, paid taxes on the entire tract, he is entitled to have the taxes prorated and to have a decree for taxes paid on the portion of the tract to which he acquired no title.—Langhorst v. Rogers, Ark., 114 S. W. 915.

104.——Bill to Remove Cloud on Title.—A bill to remove a cloud on title is limited to instruments or other proceedings in writing which appear of record and cast a doubt on the validity of the record title.—Allott v. American Strawboard Co., Ill., 86 N. E. 685.

105. **Railroads**—Connection With Other Roads.—It is no valid objection to a railroad commission's order for a connection between railroads at a junction that the objecting company will be deprived of a small amount of trackage.—Pittsburgh, C., C. & St. L. Ry Co. v. Hunt, Ind., 86 N E 328.

106. **Railroads**—Contributory Negligence.—Contributory negligence cannot be imputed to a person for failure to anticipate a railroad company's violation of a speed ordinance.—Dukeman v. Cleveland, C., C. & St. L. Ry. Co., Ill., 86 N. E. 712.

107.——Fires Set by Engines.—In order to create a liability for the destruction of plaintiff's property by fire, there must be a preponderance of proof that the fire was caused from sparks from defendant's engines, and that defendants were negligent.—Sims v. American Ice Co., Md., 71 Atl. 522.

108.——Injury to Alighting Passengers.—The care required of a carrier for a passenger's safety while leaving the train is as high as that required during transit, and it must use extraordinary care to put passengers off at a reasonably safe place.—Reardon v. St. Louis & S. F. Ry. Co., Mo., 114 S. W. 961.

109.——Injuries to Persons on Track.—A railroad company is only bound to use ordinary care to prevent injury to persons walking on or about the tracks of a railroad yard, though the company knew of such use of its tracks.—Shrader v. Nashville, C. & St. L. Ry. Co., Ky., 114 S. W. 788.

110.——Obstructing Water Course.—A lessee of the original owner of a railroad is charged in law with notice that its track would obstruct flood waters, thereby causing damage to abutting property and would be liable for the resulting damage.—Smith v. Chicago, B. & Q. R. Co., Neb., 119 N. W. 669.

111.——Regulation.—The Legislature may, to a reasonable extent, convert imperfect obligations of railroads to the public into absolute legal duties.—Pittsburgh, C. C. & St. L. Ry. Co. v. Hunt, Ind., 86 N. E. 328.

112. **Receivers**—Appointment. — Independent of statute, courts of equity, being averse to interference ex parte, will ordinarily entertain an application for the appointment of a receiver only after notice to defendant or a rule to show cause.—Marshall v. Matson Ind., 86 N. E. 339.

113.——Motion to Set Aside Sale.—Where one did not object to a receiver's sale before its approval and acquiesced therein thereafter by applying for the allowance of his claim out of the proceeds, a subsequent motion to set aside the sale was properly denied.—Dilley v. Jasper Lumber Co., Tex., 114 S. W. 878.

114. **Reformation of Instruments**—Mistake.—Where defendants signed a contract without reading it or having it read to them and they were not misled as to its contents, they could not have it reformed because of an alleged mistake therein.—Weltner v. Thurmond, Wyo., 98 Pac. 590.

115.——Specific Performance.—Where a later statute is exclusive, covering the whole subject-matter to which it relates, it repeals by implication all prior statutes on that matter, whether they are general or special.—Hampton v. Hickey, Ark., 114 S. W. 707.

116. **Statutes**—Double Taxation.—Double taxation is not favored by the law, and it will not be presumed that the Legislature intended to impose it, in the absence of legislative enactments to the contrary.—State ex rel. Pearson v. Louisiana & M. R. R. Co., Mo., 114 S. W. 956.

117. **Street Railroads**—Contributory Negligence.—A traveler on a street on which street cars are run held not justified in relying on the

expectation that if a car approaches the motorman will exercise reasonable care, but is bound to take proper measure for his own safety.—Tognazzi v. Milford & U. St. Ry. Co., Mass., 86 N. E. 799.

118.——Duty as to Person Lying Near Tracks.—A motorman, who mistook one lying near the track for a clump of dirt, was not legally bound to stop the car or slacken its speed before reaching him.—Trigg v. Water, Light & Transit Co., Mo., 114 S. W. 972.

119. **Sunday**—Validity of Contracts.—A contract for the letting of premises made on Sunday, being illegal, cannot be ratified so as to be in effect from the beginning, but may be subsequently adopted by the parties without formality.—Miles v. Janvrin, Mass., 86 N. E. 785.

120. **Taxation**—Description of Premises.—The correct description of the land assessed is essential to a valid tax.—Griffin v. Denison Land Co., N. D., 119 N. W. 104.

121.——Exemptions.—Act Feb. 14, 1855, amending the charter of Northwestern University (Priv. Laws 1855, p. 483), exempting the property of such university from taxation, applies to real estate acquired after the adoption of such amendment.—Northwestern University v. Hanberg, Ill., 86 N. E. 734.

122.——Tax Sales.—Where mortgaged land is sold at tax sale, the mortgagee is entitled to the surplus over the amount of the tax lien.—Farmer v. Ward, N. J., 71 Atl. 401.

123. **Torts**—Malicious Injury to Business.—An injury to the business of another, inflicted intentionally and without legal excuse, is malicious injury, giving a right of action to the person injured.—Lohse Patent Door Co. v. Fuelle, Mo., 114 S. W. 997.

124. **Trade Marks and Trade Names**—Unfair Competition.—A defendant manufacturing stop and waste cocks and similar plumbers' supplies which procured such articles of complainant's manufacture and purposely imitated them in size, shape and appearance, thereby causing confusion in the trade and in fact deceiving purchasers, held chargeable with unfair competition which entitled the complainant to an injunction.—H. Mueller Mfg. Co. v. A. Y. McDonald & Morrison Mfg. Co., U. S. C. C., N. D. Iowa, 164 Fed. 1001.

125.——Unfair Competition.—Where a firm used a name similar to its competitor, which was calculated to deceve the public, the competitor could have the use enjoined.—Scanlan & Bartel v. Williams, Tex., 114 S. W. 862.

126. **Trial**—Discretion of Trial Court.—The trial court did not abuse its discretion by permitting plaintiff to introduce additional testimony after argument and after the case had been taken under advisement, where defendant was given five days in which to meet the new testimony.—Burke v. Burke, Iowa, 119 N. W. 129.

127.——Instructions As to Negligence.—Definitions of negligence and contributory negligence in a charge are to be taken with what the court says on the subject in the rest of the charge.—Smith v. Detroit United Ry., Mich., 119 N. W. 640.

128. **Trover and Conversion**—Set-Offs.—Defendant innocently converting personalty held entitled to set off any sum expended by him or his predecessor in title, if his possession was also innocent, in enhancing the value of the property.—Milltown Lumber Co. v. Carter, Ga., 63 S. E. 270.

129. **Trusts**—Appointment.—The selection of a trustee is a matter in the discretion of the court, and, though the better practice requires the court to select a resident as trustee, there may be circumstances justifying a departure therefrom.—Dodge v. Dodge, Md., 71 Atl. 519.

130.——Contract Construed.—A contract by mortgagees to whom the property was conveyed to sell the property and account to the mortgagor for any surplus held an express trust.—Weltner v. Thurmond, Wyo., 98 Pac. 590.

131.——Establishment.—A bill by an administrator to declare that property received by defendant a trust fund for the estate is not a case which should be tried by jury, but is within the jurisdiction of equity, and the issues of fact may be tried by the chancellor or by sending an issue to a jury.—Chamberlain v. Eddy, Mich., 118 N. W. 499.

132. **Usury**—Consideration for Note.—A settlement of pending litigation held not a good consideration for a note given thereon so as to preclude the recovery therefor paid on the cause of action on which the suit was based.—Osborne v. Fridrich, Mo., 114 S. W. 1045.

133. **Vendor and Purchaser**—Constructive Notice.—Where land in possession of a tenant is conveyed, his continued possession as tenant of grantee held not constructive notice of the unrecorded deed.—Feinberg v. Stearns, Fla., 47 So. 797.

134. **Venue**—Jurisdiction.—The rule that a judge of the place of an alleged trespass shall have cognizance yields when the defendant actively accepts jurisdiction at his own domicile by filing an answer.—Bernstein v. Dalton Clark Stave Co., La., 47 So. 753.

135. **Waters and Water Courses**—Village Contracts.—A contract by a village with a water company to purchase its plant after a term of years held ultra vires.—Phillips Village Corp. v. Phillips Water Co., Me., 71 Atl. 474.

136. **Wills**—Condition of Forfeiture.—Where a will provided that, if any of the devisees attempted to break the will, all the property should go to others, if some of the devisees attacked the will, those who did not attack it would also be prevented from taking thereunder.—Perry v. Rogers, Tex., 114 S. W. 897.

137.——Construction.—Whether a testamentary trust is personal in its character or is annexed to the office of trustee is a matter of intention, to be gathered from a consideration of the whole will and from the nature and objects of the trust created thereby.—Dodge v. Dodge, Md., 71 Atl. 519.

138.——Construction.—Where a bequest is to one and "in case of his death" to another such expression unexplained by the context of the will refers to the happening before the death of the testator.—Fischer v. Fischer, N. J., 71 Atl. 488.

139.——Partial Intestacy.—In order to avoid partial intestacy, courts will imply cross-remainders, even of accretions of funds set apart for life tenants, though such implication will result in destroying the trusts.—Simpson v. Simpson, 113 N. Y. Supp. 370.

140.——Unnatural Disposition of Estate.—A testator of sound and disposing mind, and not governed by undue influence, has a right to leave his property as he pleases.—Scott v. Barker, 113 N. Y. Supp. 695.

141. **Witnesses**—Competency.—Heirs are competent witnesses for themselves in a suit against a co-heir defending as decedent's grantee.—Hudson p. Hudson, Ill., 86 N. E. 661.

142.——Credibility.—A copy of a newspaper containing an article giving an account of a criminal offense held properly excluded, when offered for the purpose of showing bias on the part of a witness and impeaching him.—Vogel v. State, Wis., 119 N. W. 190.

143.——Impeachment.—A written statement previously made by a witness is not admissible in evidence to contradict and impeach his testimony, unless it was called to his attention when on the stand.—Lemon v. United States, U. S. C. C. of App., Eighth Circuit, 164 Fed. 953.

144.——Privileged Communication.—To make a communication to an attorney privileged, the relation of attorney and client must exist, and the communication must be made to enable the attorney to properly conduct the suit, or to better advise his client.—Moyers v. Fogarty, Iowa, 119 N. W. 159.

145.——Refreshing Memory.—In a trial for falsely counting and reporting ballots as an election officer, it was proper to allow registrars who testified to a recount to refresh their recollection by referring to the tally sheets used by them.—Commonwealth v. Edgarton, Mass., 86 N. E. 768.